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No. 188.

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Rec'd Nov. 19, 1901.

Supreme Court of the United States.

October Term, 1901.

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WILLIAM L. TURPIN, APPELLANT,

vs.

J. H. LEMON AND A. M. LEMON, APPELLEES.

Appealed from the Circuit Court of the United States for the District of West Virginia.

STATEMENT AND BRIEF FOR APPELLANT BY C. B. MORRISON.

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STATEMENT AND BRIEF FOR APPELLANT BY C. D. MERRICK.

STATEMENT OF CASE.

This was a suit in equity brought by William J. Turpin on the 15th day of April, 1899, to set aside a tax sale and deed for land which had been assessed for taxes in the name of William J. Turpin for the years 1883 and

1884, in the County of Ritchie and State of West Virginia, and which was sold for said taxes by the Sheriff of said County on the 12th day of January, 1886, to the said J. B. and A. W. Lemon. The deed made under said sale was made by G. W. Amos, Clerk of the County Court of Ritchie County, to J. B. and A. W. Lemon on the 3rd day of February, 1887.

The bill in this case was filed alleging that the complainant, while formerly a resident of Ritchie County, had been absent from the State of West Virginia for many years and has been in poor health and, much of the time since the tax sale complained of, had been unfit to attend to business or look after the same. This statement was made explaining the seeming delay in bringing the suit now before the Court.

The bill alleged, also, that the defendants had never had any actual possession of the land in dispute, although they did casually enter upon the land and cut, from time to time, some timber thereon. The bill charges that the defendants have not been and are not in possession of the land.

The plaintiff seeks to have said tax sale and deed set aside as wholly null and void and as passing no title to the defendants, charging that the Acts of the Legislature of the State of West Virginia, as contained in the Acts of 1882 and as now incorporated in the Code of West Virginia of 1891, do not provide, with regard to the sale of land returned delinquent for taxes and the making of deeds under such sales, what is due process of law as required by the constitution of the State of West Virginia and by the first section of the Fourteenth Amendment to the Constitution of the United States, and also that said Act denies to the complainant the equal protection of the laws.

The statute under which the sale was made is attacked as an entirety, that is as a system; and as such it is alleged that it does not constitute due process of law, and that while the proceeding may have been conducted under this

statute yet the system provided is arbitrary and uncertain in its character and deprives persons of their property without a hearing and without remedy and this by the express declarations of the statute. By one portion of the statute a certain definite procedure is provided for as follows:

1. The Auditor of State shall certify to the Sheriff a list of delinquent lands for sale.

2. The Sheriff shall publish and post a notice of the sale.

3. The sale shall take place at the front door of the Court House.

4. The sale shall be made at a certain time, within certain limits fixed by the statute.

5. If the sale is not completed on the day set, there shall be an adjournment from day to day until completed.

6. The sale shall be made between the hours of 10 in the morning and 4 in the afternoon.

7. The sale shall be at public auction.

8. The person who will take the least number of acres and pay the taxes shall become the purchaser.

9. The law does not provide for any personal notice to the owner. The proceeding is *ex parte*.

10. Therefore a strict compliance with the foregoing requirements in making the sale are in a sense jurisdictional.

But the statute does not require the sheriff to show in his return of sale that he has complied with these requirements, or any of them, or even to state in general terms that the sales have been in accordance with the statute. The record as thus made up cannot possibly show *how* the Sheriff has performed his duty in advertising or making the sale in any respect.

It cannot show whether the land has been certified for sale; whether notice of sale has been posted and published; whether the sale was made on the day required by law; or within the hours required; or at the place required; or whether made at public auction; or to the person who

would take the least amount of land and pay the taxes; nor does the law provide any general statement in the return of the sheriff that the sale has been advertised or made in accordance with the statute in question.

The provisions of the statute under which the sale was made are found in the Acts of the Legislature of 1882 chapter 130 and Acts of 1883, chapter 57; sections 4, 6, 7, 8, 9, 10, 12, 13 and 14 and said sections are as follows:

"4. On or before the first day of November, in the year one thousand eight hundred and eighty-three, and in every second year thereafter, the auditor shall cause to be delivered to the sheriff or collector of the taxes for every county two lists of the real estate therein, which, at the time said lists are made out, shall have been returned delinquent for the non-payment of the taxes thereon for any previous year and not previously sold therefor, and on which the taxes and interest, or any part thereof, shall remain then unpaid and not released or otherwise discharged, with a statement of the several amounts due for state and state school taxes; county taxes for all purposes; school district and independent school district taxes; other district taxes for all purposes; and municipal corporation taxes for all purposes, on each tract or lot for each year, with interest on each amount from the twentieth day of January in the year succeeding that in which such taxes were levied, until the first day of November in the year such lists are delivered as aforesaid to the sheriff or collector, at the rate of twelve per centum per annum added thereto. But if the real estate has been sold for the non-payment of taxes, the same shall not be charged with, or again sold on account of any tax for any year previous to that for the taxes of which the sale was made; except, that if for any cause a previous sale of real estate purchased by or in behalf of the state, has been or shall be set aside by any court, and the taxes for which it was or shall be sold, have not been paid, the auditor shall include in such lists all such real estate, and the same shall be sold for the taxes and interest due thereon for the years for which it was previously sold, in like manner and with like effect as the other real estate mentioned in said lists.

"6. Within ten days after receiving such lists, the sheriff or collector shall make out and cause to be pub-

lished, once in each week for four successive weeks, in some newspaper published in the county, prior to the day of sale, an abstract of such list, in form or effect as follows:

Sale of Real Estate for Taxes.

"Notice is hereby given that the following described tracts or lots of land in the county of ————, which are delinquent for non-payment of taxes for the year (or years) 18—, will be offered for sale by the undersigned sheriff (or collector) at public auction at the front door of the court house of said county, between the hours of ten in the morning and four in the afternoon on the——day of———— 18—. Each tract or lot, or so much thereof as shall be necessary, will be sold for so much cash as is sufficient to satisfy the amount due thereon, as set forth in the following table:

Name of person charged with taxes.	Quantity of land.	Local description.	Total amount of taxes, interest, costs of publication and commissions, being amt. necessary to redeem before the sale.	Total amount of taxes, interest, costs of publication, commissions, and fee for receipt.

"Any of the aforesaid tracts or lots may be redeemed by the payment to the undersigned, sheriff (or collector), before sale, of the amount due thereon.

"Given under my hand this —— day of ———, 18—.

"A——B———,

"Sheriff (or Collector)."

"The real estate mentioned in such list, or so much thereof as shall be sufficient to satisfy the taxes, with the interest on the same, and a commission of five per cent. on

the whole amount to sheriff or collector, shall be sold at public auction, between the hours of ten in the morning and four in the afternoon, on the first day of the next November or December term of the circuit or county court of the said county, which ever may be held first after the posting of said list and the publication of said notice as herein required; or if no term of either court be held in said county in November or December, then on the second Monday in December next thereafter, unless the said taxes, interest and commissions are sooner paid to the sheriff or collector, or into the treasury of the state. He shall also as soon as such abstract is published the first time in a newspaper, as herein required, post one of the copies of the list received from the auditor, on the front door of the court house, with a like notice appended thereto. If the lists herein named be not received by the sheriff in time to publish such notice and make such sale in the month of November or December, as herein provided for, said sale shall be commenced on the first day of a circuit or county court for such county, which ever may be held first in the succeeding year next after the publication of such notice of sale. The cost of publishing such notice in a newspaper, as hereinbefore required, shall be equally distributed among the several tracts or lots of land therein named, and the amount thereby apportioned to each tract or lot shall be added to the sum for which such tract is sold, and the same shall be paid from the proceeds thereof by the sheriff or collector making the sale, except that when any tract sold at such sale is purchased by the state, the sum due for such publication shall be paid out of the school fund in the treasury of the state upon the certificate of the auditor of the amount so due. But if any one or more of the tracts or lots of land are, in any respect, not printed in such newspaper as the same is stated and set out in the abstract furnished by the sheriff for publication, no compensation shall be paid for the publication of such tract, and no sale of any such real estate as is sold by such sheriff, as aforesaid, or deed therefor to the purchaser thereof, shall be, in any way or manner affected by reason of any mistake in the publication, or posting, of such list or notice, or of the notice mentioned in section forty nine of this chapter, in any newspaper in which the same is published, or by the sheriff or collector posting the same, as to the name of the owner, the quantity or location thereof, the amount for which it is to be sold, the year or years for which it is delinquent, or otherwise. If there

be no newspaper published in the county, or if no newspaper therein will publish said list and notice for the compensation provided by law, then the sheriff shall set up one of the lists so received by him as aforesaid at the front door of the court house of his county, with the notice of sale therein provided for attached thereto, at least four weeks before the time stated in such notice, at which such sale will commence, and shall post a written or printed copy of such notice (but not of such delinquent list) at some public place in each magisterial district of his county, at least twenty days before said sale. In such case the notice shall state that the delinquent list has been posted at the door of the court house of the county. Such taxes, interest, costs of publication and commissions, may be paid to the sheriff or collector at any time before such sale, and he shall make a list of the real estate within the county, the taxes on which were paid to him as aforesaid, and return the same to the auditor. After such sale as in the succeeding section is mentioned, if any such real estate be not sold as therein required, it shall be presumed that such taxes, interest and commissions were paid, in the absence of proof to the contrary.

"7. If the said taxes, interest, costs of publication and commissions be not previously paid, the sheriff or collector shall proceed to make said sale, and if the same be not completed on the day named in the notice thereof, it shall be continued from day to day (Sundays excepted), between the hours aforesaid until it shall be completed. When it shall appear to any sheriff or collector that any real estate inserted in the lists delivered to him as aforesaid, ought not to be sold for the amount stated therein, he shall suspend the sale thereof and report his reasons therefor to the auditor, who shall thereupon make such order in relation thereto as may be just. If the real estate, the sale of which is suspended as aforesaid, ought to be sold for the same or a greater or less amount, it shall be inserted in the next list delivered to the sheriff, charged with the proper amount of taxes, interest and commissions due thereon, and sold therefor in like manner as the other real estate contained in said list.

"8. The sale shall be of each tract of land, or city, village or town lot, or of such separate quantities or parts of such tract, or of such undivided interest in such lot as

shall be sufficient to satisfy the whole of the taxes, interest and commissions mentioned in the fourth section of this chapter, remaining unpaid, and the proceeds of such sales shall be accounted for and disposed of as follows: That portion thereof which was assessed for state and state school purposes, or for any other state purpose, with the interest theron, shall be paid into the state treasury within sixty days after said sales are closed, and added to the irreducible school fund; and that portion thereof assessed for county, school district, independent school district, and other district purposes, shall be accounted for and paid over by the sheriff or collector as other county, school district, independent school district and other district taxes are accounted for and paid by him, and the part thereof assessed for municipal purposes shall be accounted for and paid over to such officer or person as the council of the city, village or town to which they belong shall direct.

"9. No sheriff, deputy sheriff, collector or other officer, who shall return any real estate delinquent for the non-payment of the taxes thereon, or who shall receive a list thereof under the provisions of the fourth section of this chapter, or who shall sell by himself, his deputy or agent, or who shall be the deputy of any officer making such sale, shall directly or indirectly purchase any real estate so sold, or be in any way directly or indirectly interested with any other person in such purchase. Every person violating this section shall forfeit one hundred dollars for each offense, and the sale shall be absolutely void, and the title to the real estate sold shall remain in the person in whose name the same was sold.

Receipt for Purchase Money—Return of Sales.

"10. The sheriff or collector on receiving from any purchaser the amount of purchase money shall grant to him a receipt for the same to the following effect:

"Memorandum of real estate sold in the county of ——— on this ——— day of ——— eighteen ———, for the non-payment of taxes charged thereon, in the said county for the year (or years) eighteen———:

Name of person charged with taxes.		
	Quantity of land charged in the county, in all the district therein.	
	In what district or districts charged with taxes.	
	Estate held therein.	
	For the year ...	Amount of tax due thereon for state and state school purposes, including interest and commissions.
	For the year ...	
	For the year ...	Amount of county taxes due thereon including same.
	For the year ...	
	For the year ...	Amount of school dist. and independent school dist. taxes due thereon, including same.
	For the year ...	
	For the year ...	Amount of other district taxes due thereon, including same.
	For the year ...	
	For the year ...	Amount of municipal taxes due thereon, including same.
	For the year ...	
		Quantity of land sold.
		Name of purchaser.
		Whole amount paid for purchase money; fee for receipt and costs of publication.

"Received of ——— the above sum of ———, it being the whole amount paid by him for the purchase money of the real estate mentioned in this memorandum, including costs of publication and the fee for this receipt.

A— B——— Sheriff (or Collector.)"

List of Sales to be Returned by Sheriff, Etc.

"12. The sheriff or collector who made the sale, shall forthwith make out a list of sales so made, with a caption thereto in form or effect as follows:

"List of real estate sold in the county of ——— in the month (or months, as the case may be,) of ——— eighteen ——, for the non-payment of the taxes charged thereon, in the said county, for the year (or years, as the case may be), eighteen———." Underneath shall be the several columns mentioned in the tenth section of this chapter, with a like caption to each column.

Affidavit to be Appended to List—Recordation of Same.

"13. There shall be appended to such list an affidavit in form or effect as follows:

"I, A—B——, sheriff (or collector or deputy for C—D—, sheriff or collector), of the county of ——, do swear that the above list contains a true account of all the real estate within my county which has been sold by me during the present year, for the non-payment of taxes thereon for the year ———, and that I am not directly or indirectly interested in the purchase of any of said real estate. So help me God." Which oath shall be subscribed and taken before some person authorized to administer oaths.

"14. The list, with the certificate of oath attached shall within thirty days after the completion of such sale, be returned to the clerk of the county court, who shall within twenty days thereafter, record the same in a well bound book, and transmit the original to the auditor. And if any sheriff or other officer whose duty it is to make out and return such list, shall fail or refuse to do so as herein required, he shall be guilty of a misdemeanor and fined not less than fifty nor more than five hundred dollars; and he and his securities in his official bond shall be liable in an action on said bond for all such damages as may be sustained by any person by reason of such failure; and such sheriff or other officer may, upon the petition of any person interested, be compelled by mandamus to make out and return such list, and the proceedings thereon shall be at his costs."

By an examination of said sections it will be seen that a specific method of procedure is laid down, the following of which certainly is *jurisdictional* so far as anything in administrative process can be considered *jurisdictional.* Yet the statute also provides a form of sale list and return by the Sheriff which enables the Sheriff to *violate every one of the requirements of the statute* in advertising and making the sale and notwithstanding such violation *make* a truthful return which will comply with all that is required in the form of such return. So that the Sheriff could violate any or all of said requirements, make a truthful return in accordance with the statute, and the record still fail to

show any irregularity, omission or mistake in advertising or selling.

The method of having a survey and report thereof made is provided by section 18 of Acts of 1882, chap. 130, as follows:

"18. The purchaser of an entire tract of land so sold and not redeemed within the said one year, his heirs or assigns, shall, at his or their expense, have a report or a survey, at his option, made, showing and specifying the metes and bounds of such tract, as far as the same can be ascertained. If a survey be made, a plat thereof as provided in the next preceding section shall be returned to the clerk of the county court, and be by him recorded as provided in said section. If a report, only be made, it shall be to said clerk and shall, in addition to what is hereinbefore prescribed, give such description of the tract sold, as will identify the same, and the clerk shall record such report in the deed book as provided in said next preceding section. The survey or report made in pursuance of this and the next preceding section, shall be made by the surveyor of the county in which the sale is made, or if he be interested, or if for any reason it be improper for him to act, or if there be no such surveyor, then by some competent and proper surveyor appointed by the county court of the county in which the real estate was sold, for the purpose, who shall take an oath that he will faithfully discharge the duties of his appointment to the best of his skill and judgment; which oath may be taken in open court, or before any person authorized by law to administer oaths, and a certificate of his having so taken said oath shall be filed with the clerk of the county court. If the purchase be of an entire city, village or town lot, no survey or report thereof need be made."

The method of obtaining a deed is provided by section 19 of Acts of 1882, chap. 130, as follows:

Deed to Purchaser, etc.; Form Of.

"19. After the expiration of the said one year, and the making of the survey or report mentioned in the seventeenth and eighteenth sections of this chapter, where the same is required, the purchaser of any real estate so sold and not redeemed as aforesaid, may obtain from the clerk of the county court of the county in which such sale

was made, a deed of conveyance for the same. Such deed shall be made to the purchaser himself, or to such person as he may direct, either in writing acknowledged as a deed is required to be acknowledged, or by his joining therein: and if the purchaser has died, the same shall be made to his heir at law or devisee, or if he assigned his purchase during his lifetime, by a writing such as is hereinbefore mentioned, it shall be made to such assignee, or to his heir at law or devisee. Such deed may be in form or effect as follows:

* * * * * * * * * *

"If the purchase was of a city, town or village lot, or a part thereof, or an undivided interest therein, the above form must be varied according to the facts."

The form provided by the statute has been followed precisely in the deed in question in this case, found on page 13 of printed record.

It will be noticed that the form used states in the second paragraph that the sale was commenced "pursuant to the statute in such case made and provided" and the third paragraph recites "Whereas at said sale so commenced, continued and completed according to law the said J. B. Lemmon and A. W. Lemmon became the purchasers," etc.

The tax deed is made by the Clerk of the County Court *who has nothing to do with making the sale and who can have no personal or official knowledge* as to the sale except that derived from the return of the Sheriff which does not say that the sale is commenced, continued or completed according to law, much less state the *manner* in which the law has been complied with. A solemn and formal statement is made in the deed by a person who has *absolutely no knowledge* of the matter, basing the statement on a Sheriff's return, which gives *absolutely no information* as to whether the law has been complied with or not.

The title conveyed by such deed and the effect of it are provided by sections 25 and 29 of chapter 130 of Acts of 1882 as follows:

What Title Conveyed by Deed When Made.

"25. When the purchaser of any real estate so sold, and not redeemed as aforesaid, his assignee, or heirs or devisees, shall have obtained a deed therefor according to the provisions of this chapter and caused the same to be admitted to record in the office of the clerk of the county court of any county in which such real estate or any part thereof may be, such right, title and interest in and to said real estate, as was vested in the person or persons charged with the taxes thereon for which it was sold, at the commencement of, or at any time during the year or years for which said taxes were assessed, and all such right, title and interest therein of any other person or persons having title thereto who have not in his or their own name been charged on the land books of the proper county or assessment district with the taxes chargeable on such real estate for the year or years for the taxes of which the same was sold, and have actually paid the same as required by law, shall be transferred to and vested in the grantee in such deed, notwithstanding any irregularity in the proceedings under which the same was sold, not herein provided for, unless such irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold, and when and for what year or years it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case, that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this chapter. When there are more than one such owner of such real estate, or person charged with taxes thereon, who are co-tenants thereof, or otherwise jointly interested therein, if the same be charged with taxes to one of them alone, or one, or more of them and others, without naming the others, such right, title, interest and estate as was vested in all, or any, or either of them, shall pass to and be vested in the grantee in such deed, and where the real estate so sold is charged to the heirs, or to the devisees of a decedent, without giving their names, or to the estate of a decedent, or to a deceased person in his or her own name, such right, title, interest and estate as was vested in the decedent at the time of his or her death in such real estate, shall pass to and be vested in the grantee in such

deed. If more than one tract of land be charged as one, or the quantity thereof or the residence of the party charged with taxes thereon, or the location of the real estate sold, or the district in which it is charged with taxes, be misstated, all such right, title, interest and estate therein as is hereinbefore mentioned, shall nevertheless pass to and be vested in the grantee in such deed. No irregularity, mistake or overcharge as to the amount of taxes, interest and commissions due on any such real estate, and for which it is sold, nor any payment of a part of such taxes, interest or commissions, shall invalidate or affect the sale of such real estate, except as to such part of said real estate proportioned to the whole thereof, as such part of said taxes, interest and commissions, so improperly charged against such real estate, and for which it was sold, bears to the whole sum for which it was sold. If the real estate sold as aforesaid be charged to a trustee by name, either with or without the addition of "trustee" or if there are more than one trustee, and it be charged to one of them, or to one or more of them, and others, without naming the others, and with or without the addition of trustee, or trustees; or if it be charged to the trustees, of ——— ———, without naming any of the trustees, all the right, title, interest and estate vested in such trustees, and each of them, and vested in each and every person for whom, or for whose use the said real estate was held in trust by such trustee or trustees, shall pass to and be vested in the grantee in such deed. If at the time of such sale the real estate sold be under a mortgage or deed of trust, or there be any other lien or encumbrance thereon, and the mortagee, trustee, *cestui que trust* or person holding any such lien or encumbrance shall fail to redeem the same within the time prescribed by the fifteenth section of this chapter, then all the right, title and interest of such mortagee, trustee, *cestui que trust*, and of the person or persons holding any such lien or incumbrance on the real estate so sold and not redeemed, shall pass to and be vested in the grantee in such deed; and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien or encumbrance. And no irregularity, error or mistake in the delinquent list or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, or in the affidavit thereto, or in the recordation of such list or affidavit, or as to the manner of laying off any real estate so sold, or in the

plat, description, or report thereof made by the surveyor or other person, shall after the deed is made, invalidate or affect the sale or deed. And if the deed be valid under the sale for the state taxes, it shall not be affected or impaired by any irregularity in the proceedings or sale for the county, district or other taxes, or any of them. If the sale be made for the taxes for two or more years, and be valid as to one or more of such years, but invalid as to the other year or years, and a deed or deeds therefor be made to the purchaser, or to his heirs, devisees or assigns, such sale or deed, for the year or years for the taxes of which the sale is valid, shall not in any way be affected or impaired by reason of the sale of the real estate conveyed by such deed being invalid for any other year or years for which it was so sold. And no deed for any real estate sold under the provisions of this chapter shall be vacated or set aside in whole or in part by reason of any mistake or irregularity in the proceedings of record as aforesaid, unless and until the person entitled to have the same so set aside shall pay or tender to the purchaser, or his heirs, devisees or assignee, or the person holding under him, or some one or more of them, the purchase money paid for the said real estate at the time of the sale thereof, and all the taxes since paid thereon for any year or years for which such person so claiming, or those under whom he claims have not paid taxes thereon, and the costs of the survey or report made as hereinbefore required, with interest on each sum from the date of the payment thereof to the time of such payment by the person so claiming. When any such sale is set aside in part, the court shall cause a partition of the real estate conveyed by the deed, if the same be necessary, between the person so claiming real estate and the holder thereof under such sale and deed, according to their respective interests therein. And when any such sale or deed is set aside in whole or in part by reason of any mistake or irregularity in the proceedings of record in the office of the clerk of the county court, the officer whose misconduct, neglect, mistake or default caused the same to be set aside, and his sureties in his official bond (if he has given such bond), shall be liable in an action on such bond, or in an action of trespass on the case, to any party injured thereby for all such damages as he may sustain by reason of the setting aside of such sale and deed, or either. But no sale or deed of any such real estate under the provisions of this chapter shall be set aside,

or in any manner affected by reason of the failure of any officer mentioned in this chapter to do or perform any act or duty herein required to be done or performed by him after such sale is made, or by the illegal or defective performance, or attempt at the performance, of any such act or duty after such sale, or by reason of the conveyance by the deed hereinbefore mentioned and prescribed, of a less quantity of real estate than that mentioned in the list of sales made out and returned as provided in the twelfth, thirteenth and fourteenth sections of this chapter, if the real estate so conveyed by such deed be, in fact, the same which was sold as delinquent."

"29. In all cases in which a question shall arise as to any such sale or deed, or the effect thereof, such deed shall be *prima facie* evidence against the owner or owners, legal or equitable, of the real estate at the time it was sold, his or their heirs and assigns, and all other persons who might have redeemed the same within said one year, as hereinbefore provided, and conclusive evidence against all other persons, that the person named in the deed as clerk of the county court was such, that the sheriff or other officer who made the sale was such sheriff or officer as stated in such deed, that the material facts therein recited are true, that such estate as is mentioned in the twenty-fifth section of this chapter vested in the grantee in the deed."

Section 25 provides that when a deed has been made pursuant to the sections quoted the title to the land shall be transfered and vested in the purchaser "notwithstanding any irregularity in the proceedings under which the same was sold not herein provided for *unless such irregularity appear on the face of such proceedings of record in the office of the Clerk of the County Court*, and be such as materially to prejudice and mislead the owner etc."

We have already seen from the sections referred to giving the return of the Sheriff that by no possibility could an irregularity or omission in the proceedings appear of record in the Clerk's office or elsewhere. The *manner* of advertising or selling can no where appear of record. The law provides *verbatim et literatim* a return for the sheriff which does not say in any particular whether or how he gave notice of sale, or when (that is in the sense

of the statute,) or where or whether at public auction, or whether to the highest bidder, the sale was made, and does not even require the general statement that the sale was advertised and made according to law. The law is so framed that *no* irregularity in its execution could by any possibility appear of record and it is further provided that the title shall vest in such purchaser *notwithstanding any irregularities* in the proceedings unless such irregularity appear on the face of such proceedings of record.

Under these conditions the mere fact that a *sheriff* returns that on a certain date he made a sale is by the law made *conclusive* in passing title.

Section 29 made the deed *prima facie* evidence of the material facts recited in the deed; but this section might well have been dispensed with after Section 25 was enacted for Section 25 goes farther than to make some deed or other paper *prima facie* evidence. It is conclusive as to everything relating to the sale because irregularities relating to the sale cannot appear of record.

These provisions of the law concealing from the public gaze the manner of executing the law, permitting each sheriff to violate the law in the form and to the extent best pleasing to himself, and requiring no return from him, providing for a deed containing a statement by an officer having no knowledge, personal or official, of the matter, that the law had been complied with, providing that no irregularity can appear of record, and that unless it does appear of record the title will pass; thus making the proceeding conclusive even before a tax deed is made; the bill charges do not furnish *due process* of law; and that the statute furnishing such a system is void as contrary to the Fourteenth Amendment of the Constitution of the United States. Pages 4 and 5 of record.

Nor has the sheriff, if it could be done, supplied what was lacking in the statute. The bill charges, page 3 of record, that it nowhere appears that the land had been certified to him for sale, or that the sheriff had published or

posted the notice required, or that the sale was made at a time he would be authorized to make such sale; or that the sale was at a place at which the sheriff was authorized to make it; or that it was at a public sale, or that it was sold to a person who would take the least number of acres and pay the taxes thereon; or that the sheriff had complied generally with the statute in making such sale.

The bill charges that the deed made was void for uncertainty in the description of the land conveyed. Page 2 of record. The bill further charges that the survey and report required by the statute to be made prior to the making of the deed was not made and recorded as required by the statute, (page 3 of record) which the bill charges rendered the deed void. The bill further charges that the action of the sheriff in making said sale did not constitute due process of law, and was void.

On the 6th day of June, 1899, the defendants filed their demurrer to the bill (page 16) and on the 14th day of August, 1900, the court rendered its decision, reciting that it "feels constrained under the rulings of the Supreme Court of the United States to hold that the Act of 1882 of the West Virginia Legislature is constitutional." It therefore sustained said demurrer and dismissed the bill. (Page 17.) At the same time with the entering of said decree the complainant filed his petition for an appeal to this court, which appeal was allowed. Page 18.

SPECIFICATIONS OF ERROR.

The appellant assigns errors in said decree as follows:

First. The Court erred in sustaining said demurrer.

Second: It erred in dismissing the bill.

Third: It erred in refusing to grant the relief prayed for by the complainant's bill.

Fourth: It erred in holding the Acts of the Legislature of West Virginia of 1882 in regard to sales of land for taxes constitutional.

Fifth: It erred in holding said act constitutional and sustaining said demurrer, because said act does not provide for due process of law, and is void under the first section of the Fourteenth Amendment to the Constitution of the United States.

Sixth: The court erred in sustaining said demurrer because the tax sale complained of was not due process of law under said first section of the Fourteenth Amendment to the Constitution of the United States.

Seventh: The Court erred in sustaining said demurrer because the said laws of West Virginia providing for tax sales did not afford to the complainant the equal protection of the laws as guaranteed by the first section of the Fourteenth Amendment of the Constitution of the United States.

Eighth: The Court erred in sustaining said demurrer because no report of survey of said land was made and placed of record before the making of said deed.

Ninth: The Court erred in sustaining said demurrer because the tax deed in the bill mentioned is void for uncertainty in the description of the land.

The assignment of errors will be found on page 19 of record.

ARGUMENT.

Reference is made in the decree appealed from to the rulings of this Court and the lower Court in entering the decree recited that it "feels constrained under said rulings to hold the Act of 1882 constitutional." We understand that the District Judge by this statement referred to the decision of this Court in the case of King vs. Mullen, 171 U. S. 404, which construed the Constitution and Statute of West Virginia providing a forfeiture of lands for failure to have the same assessed with taxes for five successive years, and held such provision valid and constitutional. If the Court below based its decision

upon the King vs. Mullen case then it wholly misconceived the effect of that case. That case related to forfeitures for failure to assess with taxes, and held that the State Constitution and Statute furnished due process of law because "the statutes provide the taxpayer a reasonable opportunity to protect his lands in a judicial proceeding, of which he is entitled to notice, and in which the Court has authority to relieve him upon reasonable terms, from the forfeiture." See Syllabus 5. That decision was reached by considering the forfeiture provisions and the provisions for a sale of the property as part of one system, and as that system required a judicial proceeding for the sale of the property and notice to the owner, making him a party to that proceeding, and permitting him to assert his rights and redeem in that proceeding the system so arranged was held to furnish due process of law.

But in the case at bar the proceeding was not under the forfeiture law for failure to assess, but under the law directing a sale of lands for the non-payment of taxes, which not only does not provide for any judicial hearing or opportunity to complain of the proceedings, but by its express terms takes away all power or right on the part of the owner to complain of any irregularities in making sale for taxes. The system providing for sales for taxes makes it impossible for the irregularities to appear of record, and at the same time says that, unless such irregularities appear of record, the title passes. The mouth of the owner is absolutely and arbitrarily closed. In King vs. Mullen the law was held valid because the system referred to in it expressly provided a judicial proceeding in which the owner should have notice and an opportunity to protect his rights, but under the tax sale law all right to complain or be heard in *any* proceeding is expressly taken away from the owner. We contend that the principles of the case of King vs. Mullen clearly indicate that the tax sale act of 1882 does not furnish due process of law and is unconstitutional because the system provided by it takes away all remedy.

STATE DECISIONS.

The act of 1882 gives a good title, notwithstanding any irregularity in the sale proceedings not appearing of record. Apparently there can be but one construction of this provision, viz: that the owner can not be heard to urge anything in the way of an objection to the proceedings which the records do not show. That this is the effect of the statute has been decided by the highest Court of West Virginia in a number of cases.

It has decided that the provisions of the 25th section of the Act "does not authorize the introduction of parol testimony to affect the validity or invalidity of a tax deed."

McCallister vs. Cottrill, 24 W. Va., 173, 174.
Carrell vs. Mitchel, 37 W. Va., 136.

And in the case of Winning vs. Eakin, 44 W. Va., 19, 29, the owner was not permitted to raise the question of whether the sale had been made between the hours fixed by the statute. The Court said (44 W. Va., 30): "The statute does direct the Sheriff as to this, but nowhere says he shall incorporate it in his report. The form of list of sales is given by the statute and contains no such matter."

STRICT COMPLIANCE WITH THE STATUTE NECESSARY.

It is proper at this point to ascertain what has heretofore been generally considered necessary in executing the tax sale laws in order to pass a good title to the purchaser.

The rule as laid down may be concisely stated as demanding that all the preliminary requirements of the

statutes, and designating the various proceedings which are to culminate in the sales, should have been strictly complied with, and that the officers who execute the power should follow with precision the course marked out for them by the law, and that the conditions subsequent to the sale, if any, should be duly observed.

Black on Tax Titles, §155.
Cooley on Taxation, 470.
25 Am. and Eng. Ency. Law, 374.
Williams vs. Peyton, 4 Wheat., 78.
Thatcher vs. Powell, 6 Wheat., 119.
Roulendorff vs. Taylor, 4 Pet., 349.
Early vs. Doe, 16 How. (U. S.), 610.
Braxton vs. Rich, 158 U. S., 375.
Marx vs. Hanthorn, 148 U. S., 172.
Yancy vs. Hopkins, 1 Munf., 419.
Wilson vs. Bell, 7 Leigh, 24.
Martin vs. Snowden, 18 Gratt., 100.

A great many similar cases may be cited, and while the course of the West Virginia decisions may not have had blazed upon it always that they were pursuant to this principle, yet a tendency has always been apparent to follow it.

DUE PROCESS OF LAW IN TAX PROCEEDINGS.

Many cases have been cited in which the question of what is due process of law in assessments and sales for taxes has arisen. Invariably the rule has been followed, that where the law gives to the party aggrieved by improper assessment or sale the opportunity to be heard in legal proceedings, and to contest therein the legality and validity of the assessment or the sale, this has been considered as furnishing due process of law. But it has been always considered essential that somewhere, somehow, and at some time, the party aggrieved should have the privilege of seeking the protection of some legally constituted tribunal or court and have his rights adjudi-

cated therein. Where this right is taken away or is unprotected the statute does not provide due process of law.

McMillen vs. Anderson, 95 U. S., 37.
Hagar vs. Reclamation Dist., 111 U. S., 701, 712, note citing many cases, and 713, note citing statutes recognizing rights in assessment matters.
Kentucky Railroad Tax Cases, 115 U. S., 321.
King vs. Mullen, 171 U. S., 404.
Scott vs. Toledo, 1 L. R. A., 688.
Speer vs. Mayor of Athens, 9 L. R. A., 402.
Kuntz vs. Sumption, 2 L. R. A., 655.

TAX DEED OR RECORD OF TAX SALES CANNOT BE MADE MADE CONCLUSIVE EVIDENCE OF TITLE.

There have been many statutes making tax deeds *prima facie* evidence of the regularity of the proceedings, and *prima facie* evidence of title. Such acts have been sustained. But it has been just as definitely settled that the legislature cannot make the tax deed conclusive evidence of the regularity of the proceedings or of the tax purchaser's title to the land. It would not be due process of law to deprive the owner of his property by making his tax purchaser's claim to it conclusive.

Marx vs. Hanthorn, 148 U. S., 172.
Bannon vs. Burnes, 39 Fed. Rep., 892.
Kelly vs. Herrall, 20 Fed. Rep., 364.
Stoudenmire vs. Brown, 48 Ala., 699.
Calhoun vs. Fletcher, 63 Ala., 574.
McCready vs. Sexton, 29 Iowa, 356.
Powers vs. Fuller, 30 Iowa, 476.
Immegart vs. Gorgus, 41 Iowa, 439.
Abbott vs. Lindenboner, 42 Mo., 162.
Roth vs. Gabbert, 123 Mo., 21.
Larson vs. Dickey, 39 Neb., 463.
Cooley on Taxation, 521.

In the case at bar the deed is not made conclusive evidence of title in the purchaser, but by the mere return of the Sheriff that a sale has been made, notwithstanding any irregularity in the proceedings of sale not appearing of record, the title is vested in the purchaser at the tax sale. It is an absolute, conclusive and arbitrary provision transfering the property of one person to another without any opportunity to controvert any of the facts, even those absolutely jurisdictional, in the sale proceedings. It is in direct conflict with the decisions cited.

A statute making the deed *prima facie* evidence does not dispense with the performance of any of the requirements prescribed by law. It only shifts the burden of proof of such performance from the party claiming under the deed to the party attacking it.

Parkers vs. Overman, 18 How., 137.
Thomas vs. Lawson, 21 How., 331.

But the effect of the West Virginia statute in question is to dispense with the material requirements of the law, requirements which have heretofore everywhere been considered essential and jurisdictional. The officer making the sale is enabled to dispense with one or all of those requirements, make a truthful return under the statute, and yet a return which will conclusively and arbitrarily take away the property of the person in whose name the property is sold. He will not be heard in any Court or by any proceeding to say a word in protection of his rights, or to controvert the regularity of the proceedings, as to any irregularity not appearing of record; and as we have seen those irregularities would be the ones relating to the sale and jurisdictional in their effect.

ARBITRARY POWER CONFERRED.

Statutes conferring a purely arbitrary power upon officers are void. It is not the partial nature of the rule

so much as its *arbitrary* and *unusual character* which condemns it as not being due process of law.

Cooley's Const. Lim., 354.
Yick Wo vs. Hopkins, 118 U. S. 356, 370.
Minnesota vs. Barber, 136 U. S. 328, 329.
Collins vs. New Hampshire, 171, U. S. 30, 34.
Hurtado vs. California, 110 U. S , 535, 536.
Davidson vs. New Orleans, 18 How., 272.
Leeper vs. Texas, 129 U. S. 463.
Geoyza vs, Tiernan, 148 U. S. 662.
Duncan vs. Missouri, 152 U. S. 377.

In the case at bar the authority is conferred upon the officer selling to choose his own mode of selling, full liberty being given him to follow or disobey the statute. Again, having made it not only possible, but seemingly desirable to the officer to disobey the law, and also to return his record of sales in such a form as not to disclose his irregularities, the law again declares arbitrarily that the owner of the land shall not be permitted to show such irregularity in *any* proceeding. The record framed to conceal irregularities is made to conclusively pass the title.

The law furnishes an arbitrary, uncertain and unusual method of depriving a person of his property and it is void.

It is axiomatic in this land that there shall be no denial of justice, yet the statute in question is framed expressly providing for such denial of justice.

It is not necessary in order to raise the taxes necessary for the support of the government that the law should authorize arbitrary and wilful action by the officers and authorize and direct the concealment of such arbitrary and wilful action, and deny all remedy or hearing to the party aggrieved.

STATE DECISIONS UPON ACT OF 1882.

In the Court below counsel for the appellee claimed that the decisions of the State Court upon the Statute

must govern and that the rights of the owner of property sold for taxes must be governed by the statute.

The cases referred to by counsel have not attempted to pass on the constitutionality of the statute or to say whether it furnished due process of law.

The case of State vs. Sponagle, 45 W. Va. 415, 427 does pass on the constitutional provision for the forfeiture of lands, for failure to assess them with taxes, holding that such provision coupled with the statute under it are not in conflict with the Fourteenth Amendment of the Constitution of the United States as they give the owner of the property a hearing before he is finally deprived of his property. The case of King vs. Mullen, 171 U. S., already referred to in this argument, is upon these same forfeiture provisions and holds them valid as already stated because the statutes give the owner of the property a hearing. But neither King vs. Mullen nor State vs. Sponagle pass on the validity of the tax sale laws of West Virginia. Nor is there any West Virginia case which does pass on the validity of the statute in controversy in this case. The cases are confined to construing the mere words of the statute and indicating which irregularities come within the terms of the statute, and in none of them is the validity of the statute raised.

Winning vs. Eakin, 44 W. Va., 19, 21, 23 and 26.
State vs. Sponagle, 45 W. Va., 431.
Hayes vs. Heatherly, 36 W. Va., 633.
Phillips vs. Minear, 40 W. Va., 64.

Even if the State Court had passed on the validity of the statute in various decisions, this would not prevent this Court from determining whether the proceedings under the statute furnished due process of law. Some of the decisions cited by counsel for appellees recognize this.

State vs. Sponagle, 45 W. Va., 415, syllabus 4.

LACHES.

There has been no actual possession of the property in question by the tax purchaser. Under those circumstances laches will not be imputed to the owner of real estate sold for taxes though he fails for any length of time to bring a suit to set aside the tax deed. This has been held in a number of cases.

State vs. Sponagle, 45 W. Va., 415.
Simmons vs. Ward, 41 W. Va., 80.
Batton vs. Woods, 27 W. Va., 58.
Cook vs. Lasher, 19, C. C. A., 655.
U. S. vs. Insley, 130 U. S., 263.

DENYING EQUAL PROTECTION OF THE LAWS.

The way is open for a full consideration of the statute. It provides a system of procedure arbitrary and uncertain in its character and effects. It arbitrarily deprives the injured party of his property without any opportunity, at any time or in any Court, of questioning the validity of the sale even on the points which are jurisdictional. It gives to each sheriff selling the power to violate or comply with the law, as seems best to him. One officer may comply with, and the next violate, the law. In one county the Sheriff may obey the law. In the next he may go out into the country and sell the land at private sale to the person he wishes to favor. He can do this and truthfully comply with the law in making his return, and under the statute his action can never be questioned. Each Sheriff can make the law to suit himself, and his action is arbitrarily conclusive because what his action is does not appear of record. The law may be enforced against A's land in one manner and against B's in an entirely different manner. Both may be in violation of the law. Neither A or B have any remedy. In that sense they have "the equal protection of the laws;" that is, neither one have

any protection. But in the sense that the law should provide a method which must be used and used in the same way as to the land of every one sold for taxes they are denied the equal protection of the laws. Because one officer may by his manner of selling afford protection and the next deprive the land owner of all protection.

The statute does not furnish due process of law. Nor does it afford to the complainant the equal protection of the laws. The statute is unconstitutional. The sale and deed are null and void, and should be set aside.

C. D. MERRICK.